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No. 94-2138

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1995

JOHN J. WILEY, *et al.*,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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July 26, 1995

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Fourth Circuit hold correctly that the Fifth Amendment privilege against self-incrimination is not violated by a public employer's compulsion of statements from employees, without compelled waiver of the privilege or immunity and without the use of the compelled statements against the makers in subsequent criminal, administrative or other proceedings?

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED i

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

LONG-STANDING DECISIONS OF THIS COURT ANSWER THE QUESTION PRESENTED IN THIS CASE, RENDERING THE GRANT OF CERTIORARI UNNECESSARY 3

THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE COURTS OF APPEAL 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Confederation of Police v. Conlisk,
489 F.2d 891 (7th Cir. 1973) 7

Cooper v. Dupnik,
963 F.2d 1220 (9th Cir.)(en banc),
cert. denied, 113 S. Ct. 407 (1992) . . 7, 8, 9

Gardner v. Broderick,
392 U.S. 273 (1968) 3, 4, 5, 6

Garrity v. New Jersey,
385 U.S. 493 (1967) 3, 4, 5

Gray v. Spillman,
925 F.2d 90 (4th Cir. 1991) 9

Gulden v. McCorkle,
680 F.2d 1070 (5th Cir. 1982) 7

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 7

Miranda v. Arizona,
384 U.S. 436 (1966) 8

Uniformed Sanitation Men Ass'n v.
Commissioner of Sanitation,
392 U.S. 280 (1968) 3, 4, 5

United States v. Devitt,
499 F.2d 135 (7th Cir. 1974) 7

STATUTE:

42 U.S.C. §1983 8

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COUNTERSTATEMENT OF THE CASE

In December 1987, the Office of the State's Attorney for Baltimore City and the Baltimore City Police Department conducted an investigation into a shooting incident in which police officer involvement was suspected. The investigation focused, in part, on the four police officers who are petitioners here. During the course of the investigation, the officers were ordered to submit to

polygraph examination. The officers were informed that their failure to submit to the examination could result in disciplinary action, including suspension or termination. Each officer submitted to examination. (App. 2-3.) The officers were also called to testify before the grand jury. (App. 2.) All questions posed to the officers were narrowly job-related. (App. 12.)

At no time during the polygraph examinations did any officer assert, or attempt to assert, his Fifth Amendment rights. Nor were the officers asked to waive their Fifth Amendment rights or the immunities derived from the Fifth Amendment. In fact, one officer, Sergeant John J. Wiley, successfully invoked his Fifth Amendment right against compelled self-incrimination while testifying before the grand jury. None of the officers were charged with any criminal offense and at no time were their polygraph or grand jury statements used against them in a criminal or other proceeding. (App. 3.)

REASONS FOR DENYING THE WRIT

LONG-STANDING DECISIONS OF THIS COURT ANSWER THE QUESTION PRESENTED IN THIS CASE, RENDERING THE GRANT OF CERTIORARI UNNECESSARY.

Because the decision below conforms with prior decisions of this Court, further review of this case is unwarranted. By this Court's decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968), a framework for the analysis of Fifth Amendment issues involving public employees has been established. The lower court analyzed the issue presented in this case within that framework, reaching a result consonant with this Court's decisions and decisions reached in other courts of appeal.

The first case decided, *Garrity*, held that statements provided by a public employee threatened with removal from office for failure to respond cannot later be used against the employee in criminal proceedings. 385 U.S. at 499-500. Essentially, the *Garrity* decision provides use immunity in the circumstance in which a public employee

is coerced into making statements under threat of termination.

Gardner and *Uniformed Sanitation Men* established that an employee may not be compelled to answer questions while at the same time being compelled to waive the immunities inherent in the Fifth Amendment privilege against self-incrimination. *Gardner*, 392 U.S. at 278; *Uniformed Sanitation Men*, 392 U.S. at 284. The *Gardner* Court made clear, however, that there would be no constitutional violation if an employee was forced to answer "questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof." 392 U.S. at 278 (footnote omitted).

Drawn from these cases is the principle that a public employee may be compelled to respond to job-related questions that may incriminate him, but is entitled to immunity under the Fifth Amendment preventing the use of the statements or fruits thereof in a subsequent criminal proceeding against the employee. *Garrity*, 385 U.S. at

499-500. The Fifth Amendment is violated only when a public employee is compelled to respond to questions and to waive the protections afforded by the Fifth Amendment, *i.e.*, use and derivative use immunity, *Gardner*, 392 U.S. at 278; *Uniformed Sanitation Men*, 392 U.S. at 284, or when the compelled statements are used against the employee in a subsequent criminal proceeding. *Garrity*, 385 U.S. at 499-500.

In the present case, the police officers were asked job-related questions under the threat of disciplinary action for refusal to respond. At no point did the officers invoke the privilege against self-incrimination and at no point were the officers asked to waive any protection they had pursuant to *Garrity* and its progeny. Further, the statements made by the offices have never been used against them in a criminal or other proceeding. Therefore, there was no Fifth Amendment violation.

Petitioners assert that the nature of the investigation during which the officers were questioned takes this case outside the scope of existing law. This simply is not true. The *Gardner* case involved compelled grand jury testimony

from police officers during the course of a criminal investigation. 392 U.S. at 274. That Court nevertheless explained that no constitutional violation would have occurred if, as here, the officers had not been compelled to waive their immunity from use of the statements.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE COURTS OF APPEAL.

Petitioners also assert that the mere compulsion of the statements from the officers constitutes a constitutional violation, regardless of the fact that the statements were not used against the officers in subsequent criminal proceedings and regardless of the fact that the officers were not compelled to waive their immunity. On this point, Petitioners assert that the courts of appeal are split. A careful review of the relevant cases demonstrates, however, that no inconsistency or "split" exists.

This Court and the courts of appeal have consistently held that an employer may ask job-related questions to employees under threat of termination.

> Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their

> official duties if they have not been required to surrender their constitutional immunity.

Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); *see also, e.g., Gulden v. McCorkle*, 680 F.2d 1070, 1073 (5th Cir. 1982); *United States v. Devitt*, 499 F.2d 135, 142 (7th Cir. 1974); *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973). Thus, the mere compulsion, through threat of termination, does not constitute a constitutional violation.

The only case cited by Petitioners in which the mere compulsion of statements did constitute a Fifth Amendment violation is factually and legally distinguishable. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.)(en banc), *cert. denied*, 113 S. Ct. 407 (1992), the plaintiff was arrested, taken into an interrogation room, and read the *Miranda* warning. The plaintiff responded that he did not want to speak with the arresting officers and that he wanted to have an attorney present; he repeated this position several times during the interrogation. Despite the plaintiff's requests, the officers continued to question him for several hours in an attempt

to coerce a confession. The officers had planned in advance to interrogate the plaintiff regardless of his invocation of Fifth Amendment rights. The Ninth Circuit held that the plaintiff had articulated a viable 42 U.S.C. §1983 claim based on the Fifth Amendment as well as the Fourteenth Amendment.

The Ninth Circuit explained that the substantive Fifth Amendment right upon which the plaintiff could base a §1983 action arose out of his request to have an attorney present:

> As to a request by a suspect to consult with an attorney, the [*Miranda v. Arizona*, 384 U.S. 436 (1966)] Court was equally clear: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. *A request for an attorney is thus regarded as an invocation of the substantive right to remain silent.*

Cooper, 963 F.2d at 1240 (emphasis added); *see also id.* at 1252-53 (Wiggins, J., concurring). The Court also held that the police officers' conduct during the interrogation served as the basis for the plaintiff's substantive due

process claim under the Fourteenth Amendment. *See id.* at 1244-50.

The substantive right that provided a §1983 action to the plaintiff in *Cooper* clearly was not at issue here where the officers did not invoke any Fifth Amendment protections during the questioning. Further, the alternative basis for the plaintiff's claim in *Cooper*, namely a substantive due process violation, is not presented in this case. Thus, *Cooper* is inapposite and does not conflict with the lower court's opinion here.[1]

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[1] Likewise, *Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991) does not conflict with the decision below as that decision merely holds that the existence of severe physical injury is not a prerequisite to the maintenance of a §1983 action based on Fifth and Fourteenth Amendment violations. The *Gray* court did not discuss the substance of any Fifth Amendment claim the plaintiff, who allegedly was beaten during the course of a police interrogation, could have maintained.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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